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Supreme Court, U.S.
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No. 01-359

In The
SUPREME COURT OF THE UNITED STATES

LORI A. SAFRIT,
Petitioner,
v.
CONE MILLS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

This case presents the most recent application of the Fourth Circuit's much criticized decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F. 3d 875 (4th Cir. 1995), *cert. denied* 519 U.S. 980 (1996). As we noted in the Petition, the holding in *Austin* has been explicitly rejected by seven other circuits. Respondent does not deny the existence of this widely noted inter-circuit conflict, and does not question its importance.

The proceedings below also raised a significant question about the meaning of this Court's decision in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). Since *Carson v. Giant Food, Inc.*, 175 F. 3d 325 (4th Cir. 1999), the Fourth Circuit has followed a somewhat idiosyncratic interpretation of *Wright*. As respondent correctly observes, if an employee seeks judicial relief from unlawful discrimination, an employer in the Fourth Circuit can defeat that claim by showing that an applicable collective bargaining agreement "incorporates, '*in toto*, the anti-discrimination statutes that prohibit those acts.'" (Br. Opp. 9[1]22, *quoting Brown v. ABF Freight Systems, Inc.*, 183 F. 3d 319, 322 (4th Cir. 1999).

This "incorporation *in toto*" rule is well established Fourth Circuit law. "If [a] provision . . . makes it unmistakably clear that the discrimination statutes at issue are part of the [collective bargaining] agreement, employees will be bound to arbitrate their federal claims." *Carson v. Giant Food, Inc.*, 175 F. 3d 325, 331 (4th Cir. 1999); *Brown v. ABF Freight Systems,*

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[1]See Br. Opp. 10 (a "collective bargaining agreement drafted . . . in a manner that incorporates the discrimination statute, in toto, will contain a binding arbitration agreement in the Fourth Circuit.") A third passage in the Brief in Opposition, on the other hand, suggests that in addition to incorporation there must also be "a provision to arbitrate all disputes arising under the agreement." (Br.Opp. 9).

Inc., 183 F. 3d 319, 321 (4th Cir. 1999)(even where the arbitration clause is "not so clear", judicial enforcement is precluded if it is clear "that the discrimination statutes at issue are part of the agreement"); *Robinson v. Healthtex, Incorporated*, 2000 WL 691053 *3 (4th Cir.)(*Wright* requirement met by showing the parties' "intent to incorporate in their entirety the discrimination statutes at issue").

Even where there is no express requirement that all employment disputes be submitted to arbitration, the incorporation of a particular federal law into the collective bargaining agreement can operate in the Fourth Circuit to strip workers of their right to judicial enforcement.[2] In the proceedings below the express incorporation of Title VII into the CBA in question was held sufficient by itself to preclude this action. (Pet. App. 9a)[3].

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[2]The Fourth Circuit's standard has become increasingly broad. *Carson* itself contained one passage suggesting that the CBA would also need to have a "[g]eneral arbitration clause", "such as those referring to 'all disputes' or 'all disputes concerning the interpretation of the agreement.'" 175 F. 3d at 331. Next *Brown* referred to an arbitration clause that was "not so clear", without explaining whether it meant that an unclear arbitration clause also required incorporation, or that an incorporation also required an unclear arbitration clause, or perhaps both. 183 F. 3d at 321. *Robinson* quoted the "not so clear" phrase from *Brown*, but appeared to regard incorporation *vel non* as the dispositive issue.

In the litigation below the district court construed *Carson* to only require incorporation. Pet. App. 9a. The court of appeals referred to "a general clause requiring arbitration under the agreement". (Pet. App. 3a). But in holding that the CBA waived petitioner's claims, however, the court of appeals noted that the union was *not* required under the CBA to seek arbitration, explaining instead that arbitration was merely "the exclusive option" of the union. (Pet. App. 2a).

[3]Under controlling Fourth Circuit authority it was apparently irrelevant that the CBA stated that unresolved grievances regarding alleged violations

In the court of appeals we objected to the Fourth Circuit's interpretation of *Wright*. Respondent in the court below correctly described that argument as raising a dispute about the legal "standards" to be applied under *Wright*[4]. In this Court, however, respondent seeks to characterize this issue as a dispute of fact. (R.Br. 6-7). That is wrong for two reasons. First, there is no dispute that the CBA in this case does indeed explicitly incorporate Title VII; it is the legal significance of that incorporation that is at issue. Second, if the application of Wright were indeed a factual issue, this Court in *Wright* would have remanded that question to the district court; instead the Court itself resolved whether the CBA in that case met the "clear and unmistakable waiver" standard.[5]

(3) We urge that certiorari should be granted because the rule in *Austin* and its progeny conflicts with this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and because the incorporation doctrine in *Carson* and its

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of Title VII were a "proper" subject for arbitration rather than a "mandatory" subject for arbitration. See Petition, p. 3 n. 1.

[4]We urged that the mere incorporation of Title VII into a CBA was insufficient under *Wright*, and that this Court's decision required that a CBA also contain a provision stating that employees were "giving up their federal forum." (Brief of Appellant, No. 99-2677, p. 10.) Respondent insisted that the Fourth Circuit's earlier decisions in *Brown* and *Carson* had held that no such express statement was necessary. (Brief of Defendant-Appellee, p. 16)("[Appellant] would require an express statement to the employees that the 'judicial forum' is waived. . . . Plaintiff advances this self-serving suggestion for the obvious reason that the Agreement in this case clearly meets the standards adopted in *Carson* and *Brown* . . . . [A]bsent an *en banc* decision by this court to reverse *Carson* and *Brown*, this argument should be rejected.")

[5]*Wright*, 525 U.S. at 81 ("we do not find a clear and unmistakable waiver"), 82 ("We hold that the collective bargaining agreement in this case does not contain a clear and unmistakable waiver.")

progeny conflicts with this Court's decision in *Wright*. Respondent objects that the possible existence of the second legal error should preclude consideration of the first. (Br. Opp. 6-7).

That contention is unsound. This is a not a situation in which a lower court decision rests on two independent grounds, only one of which was erroneous, but a case in which a single ground (dismissal of the complaint because of the CBA) is tainted by two distinct legal errors (the *Austin* rule and the incorporation doctrine). The existence of a multiplicity of legal errors has never been thought to insulate an otherwise certworthy issue from review by this Court. Were that the case, appellate courts would have a perverse incentive to commit additional error. This Court's criteria for granting review are not limited to appellate opinions which conflict with only a *single* decision of this Court, but include cases in which a court of appeals "has decided a federal question in a way that conflicts with applicable *decisions* of this Court." Sup. Ct. Rule 10(c)(Emphasis added).

The existence of a *Wright* violation would not preclude this Court from also resolving the *Alexander* question; the decisions of this Court frequently correct several different errors in a lower court decision[6]. The Court might also elect to first address the *Alexander* issue, without reaching the *Wright* question. The Court, moreover, has the discretion to reframe the Question Presented to limit it to the *Alexander* issue.

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[6] *Lewis v. Lewis & Clark Marine, Inc.*, 121 S.Ct. 993 (2001); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Blessing v. Freestone*, 520 U.S. 329 (1997); *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996); *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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